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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 649

M. RAYMOND ADLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL H. GREENBERG
Attorney for Petitioner
475 Fifth Avenue
New York, New York 10017
LExington 2-6600

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Petitioner, M. Raymond Adler prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 27, 1967.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is set forth as Appendix A, hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 27, 1967. On August 23, 1967, Mr. Justice John M. Harlan, Associate Justice and Circuit Justice for the Second Circuit, entered an order extending the time of peti-

tioner for filing the petition for writ of certiorari herein until September 26, 1967. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

1. Whether petitioner's allegedly false statement to an agent of the Federal Bureau of Investigation, whereby he attempted to initiate a complaint with said bureau, constituted a false statement in a "matter within the jurisdiction of any department or agency of the United States", in violation of Title 18, United States Code, §1001. The Court of Appeals for the Second Circuit in this case held such statement to be violation of said criminal statute, whereas the Court of Appeals for the Eighth Circuit in the case of *Friedman* v. *United States,* 374 F. 2d 363 (1967), held that a similar statement was not within the statute.

2. Whether the oral statement of complaint allegedly made by petitioner to an F.B.I. agent was, in the circumstances of this case, a criminally false statement, or whether it constituted merely a seeking of information or a preliminary inquiry prior to the making of a formal complaint; and whether in the making of said statement there was any proof of criminal intent on the part of petitioner.

3. Whether, under the circumstances of this case, the proof of the falsity of petitioner's oral complaint, consisting of his latter admission to another F.B.I. agent that said original oral complaint was false, was obtained from him in express violation of his constitutional right to counsel, especially after the government had been notified by petitioner's counsel that it did not want him to be interrogated with respect to this matter in the absence of counsel.

Statutory Provision

Title 18, United States Code

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statement of the Case

The Indictment

Petitioner was indicted in the United States District Court for the Southern District of New York (Docket No. 66 Cr. 528) of the following charge:

"The Grand Jury charges:

On or about the 26th day of July, 1963, in the Southern District of New York, M. Raymond Adler, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Federal Bureau of Investigation, United States Department of Justice, unlawfully, wilfully and knowingly did make false, fictitious and fraudulent statements and representations, namely, that while he was engaged in the performance of a construction con-

tract for the United States, public officials corruptly exacted money and other things of value from him in return for being influenced in their performance of official acts in connection with the said contract, whereas in truth and in fact, as the defendant then and there well knew, no money or other thing of value had been so exacted by any public official.

(Title 18, United States Code, Section 1001)"

The Record

The record in this case consists of the original record of proceedings in the District Court and a photo-copied appendix filed by petitioner in the Court of Appeals. The government also filed a printed appendix which merely duplicated in part portions of petitioner's appendix. Petitioner's appendix contained all of the proceedings of the District Court.

District Court Proceedings

Petitioner was tried before Honorable Edward C. McLean, United States District Judge, having waived trial by jury. At the conclusion of the trial Judge McLean dictated an oral decision into the record in which he found the petitioner guilty as charged. Said oral decision is reprinted as Appendix B, *infra*.

Thereupon, petitioner was sentenced to pay a fine of $2,500, which fine has been paid.

The Facts

On July 26, 1963 (the date of the crime alleged in the indictment), petitioner M. Raymond Adler appeared at the New York office of the Federal Bureau of Investigation, where he was directed to Special Agent Martin Weinberg. According to Mr. Weinberg's testimony the following transpired:

> "A. Yes. Mr. Adler came into the office and I was assigned to speak with him and he told me that he was there on behalf of a friend, and that this friend had a construction contract at a Government installation and in the course of the completion of this construction contract the friend was required to pay bribes to various Government officials.
>
> Mr. Adler stated that he hoped the FBI would do nothing more than reprimand the Government officials involved so that this bribery would stop.
>
> At that point I asked Mr. Adler directly whether in fact there was a friend, or was he talking about himself, to which he replied that he was talking about himself.
>
> At that point I indicated to Mr. Adler that he need make no further statements, that anything he did say could be used against him, and that he was entitled to the services of counsel before continuing.
>
> He stated that he did not wish to make any other statements at that time but indicated that if he were questioned by any other party regarding bribery he would deny it. He also indicated that he would be in his office at 420 Lexington Avenue on the following Monday morning.

Q. Was anything further said by you or by him? A. At the time I think I mentioned to him that if there was an allegation of bribery we would in the FBI not stop at just reprimanding someone, but look to see if there was substantiation of the bribery allegation for submission to the proper authorities.

Q. And that is all that was said? A. At that first meeting, yes.

Q. Did you ever meet Mr. Adler again? A. Yes, I met him the following Monday morning, which would be July 29, 1963, at his office. I again reminded him that he had the right to services of counsel, that he need make no statements, and if he did they could possibly be used against him.

He stated at that time that he had not spoken to his attorney and therefore did not wish to discuss anything further. However, at the time he did state that he felt it would be unfair to both him and his company to talk any further because contracts were in an early stage and that if he were questioned by either the grand jury or by any other agents as to bribery he would again deny it.

At that point I left his office." (App. App. 5-7)[1]

At both of these meetings the only persons present were Agent Weinberg and petitioner.

Thereafter petitioner received a grand jury subpoena to appear before a Federal grand jury in the Southern District of New York on November 7, 1963 (App. App. 96-97; Def't Exh. A). Following his receipt of said subpoena

[1] All numbers in parentheses refer to pages in Appellant's Appendix filed in the Court of Appeals and in this Court.

petitioner retained counsel to represent him in this matter. He was represented by a former assistant United States attorney in the grand jury proceedings and in appearances before the office of the United States Attorney for the Southern District of New York (App. App. 95). His attorney discussed this case with various attorneys in the United States Attorney's office. On November 27, 1963, he notified the assistant United States attorney in charge of this case that he was advising the petitioner that he should claim his privilege against self-incrimination when he appeared before the grand jury and that he did not wish him to be further questioned by any authorities on the matter. On December 5, 1963, petitioner appeared before the grand jury, where he claimed his privilege against self-incrimination and refused to answer any questions. At no time after December 5, 1963, did any government agent or official ever communicate with counsel to seek permission to interview petitioner, nor did any government agent or official advise counsel that petitioner would be interviewed or questioned thereafter (App. App. 98-100).

Notwithstanding counsel's statement, nevertheless on February 25, 1965, petitioner was interviewed by another F.B.I. agent. Said agent testified that he knew that counsel was representing petitioner and that said counsel stated he did not wish petitioner to be interviewed in the absence of counsel. This agent testified that he had reviewed the F.B.I. file in this matter before coming to petitioner's office on February 25, 1965, and that in spite of his knowledge of the background facts of this case he did question petitioner about it. A careful reading of this agent's testimony (App. App. 112-125) discloses very clearly that the agent led petitioner to believe that only a written state-

ment or a statement under oath could be used against him, but that an oral statement made in the course of an informal discussion between the agent and petitioner could not be so used. It was during the course of said interview that petitioner ostensibly stated that his original "complaint" was false. Apparently, this statement was made prior to the agent's warning to appellant as to his constitutional right of silence and the agent's clear statement to the effect that only a written statement or a statement under oath could be used against him.

The sole proof of the falsity of the alleged original statement made by petitioner on July 26, 1963, was his subsequent "admission" on February 25, 1965, that said original statement was false.

Reasons for Granting the Writ

The clear and expressed conflict between the Courts of Appeals for the Second and Eighth Circuits, as to the scope and applicability of Title 18, United States Code, §1001, to the allegedly false initiation of complaints to law enforcement agencies, requires resolution by this Court. See Rule 19 1(b), Revised Rules of the Supreme Court, effective October 2, 1967. The meaning, purpose and construction of this criminal statute also requires definitive interpretation and decision by this Court.

1. Petitioner's allegedly false statement to an agent of the F.B.I., whereby he attempted to initiate a complaint with said bureau, did not constitute a false statement in a "matter within the jurisdiction of any department or agency of the United States", in violation of 18 U. S. C. §1001.

The holding of the Court of Appeals for the Second Circuit in this case that any such statement is a violation of this criminal statute, is in direct and expressed conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Friedman* v. *United States,* 374 F. 2d 363 (1967), holding that a similar complaint statement to the F.B.I. was not within the intention, meaning and scope of this statute, and hence not a criminal violation of law.

Apart from petitioner's showing that he did *not* make any alleged false statement,[2] it is his contention that at the time and place set forth in the indictment there was not then any matter pending "within the jurisdiction of any department or agency of the United States". The opinion of Circuit Judge Floyd R. Gibson in the *Friedman* case, *supra,* supports this view in an opinion containing an analysis of the principal cases on this subject, showing the historical and legislative background of the statute, the purposes for which it was revised in 1934, and its present construction. The conclusion is clearly reached that the making of a false statement to an investigative agency, having no rule-making or adjudicative power or jurisdiction over the matters in issue, does not constitute a violation of this statute. *United States* v. *Bramblett,* 348 U. S. 503 (1955); *United States* v. *Gilliland,* 312 U. S. 86 (1941); *United States* v. *Stark,* 131 F. Supp. 190 (D. C. Md., 1955, opinion by Chesnut, *D.J.*). See, e.g., *Gonzales* v. *United States,* 286 F. 2d 118 (10th Cir., 1960); *Carroll Vocational*

[2] Petitioner urges that Agent Weinberg's testimony shows that all petitioner did was to attempt to initiate a complaint of shakedowns and that when Agent Weinberg advised him of his rights, he refrained from making any further statement. A giver of bribes is equally as culpable as a seeker of bribes. See 18 U. S. C. §§201, 203.

Institute v. *United States*, 211 F. 2d 539, 540 (5th Cir., 1954).[3]

As to cases concerning the furnishing of false information to investigative agencies such as the F.B.I., every reported case, except this one and *United States* v. *Van Valkenburg*, 157 F. Supp. 599 (D. C. Alaska 1958), has held that the alleged false statements were not made "in any matter within the jurisdiction of any department or agency of the United States". In addition to the *Friedman* case, *supra*, these include *Paternostro* v. *United States*, 311 F. 2d 298 (5th Cir., 1962); *United States* v. *Levin*, 133 F. Supp. 88 (D. C. Colo., 1953, opinion by Circuit Judge Pickett); *United States* v. *Stark*, *supra*; *United States* v. *Davey*, 155 F. Supp. 175 (D. C. S. D. N. Y., 1957); *United States* v. *Philippe*, 173 F. Supp. 582 (D. C. S. D. N. Y., 1959).

The Court of Appeals in this case attempts to distinguish the so-called "exculpatory no" cases from among those cited, as not falling within the statute's coverage without any reasoned analysis justifying such distinction. The court attempts to justify this prosecution as being within the coverage of the statute, stating that petitioner "made an affirmative voluntary statement deliberately intended to provoke agency action" (Appendix A, *infra*). Apart from petitioner's argument that he did not have any such intention, and that he attempted to withdraw his pre-

[3] The cases principally relied on by the Court of Appeals and the District Court herein (Appendix A and B, *infra*) are *Brandow* v. *United States*, 268 F. 2d 559 (9th Cir., 1959) and *United States* v. *McCue*, 301 F. 2d 452 (2nd Cir., 1962), cert. den. 370 U. S. 939 (1962). As Circuit Judge Gibson points out in his classification of cases on this subject, both of these cases related to false statements made while the defendants were "resisting * * * monetary claims by the United States by presentation of false information" (374 F. 2d 363, 368).

liminary inquiry within the first minute of his interview with Agent Weinberg, he argues further that in no event is the submission of a complaint to the F.B.I., or other federal law enforcement agency, actionable as criminal within the meaning, scope and intention of this statute.

In light of the conflict among the circuits over this question, and its importance in the future administration of this statute, it is submitted that certiorari should be granted to review this case.

2. The oral statement of complaint allegedly made by petitioner to an F.B.I. agent was, in the circumstances of this case, not a criminally false statement. In substance it constituted merely a seeking of information or a preliminary inquiry prior to the making of a formal complaint. In any event, in making said statement there was no proof that petitioner had a criminal intent. The testimony of F.B.I. Agent Weinberg, reprinted *supra,* discloses that after petitioner's hypothetical inquiry concerning a purported "friend" being shaken down for bribes, and the agent's pointed questioning statement to petitioner that he was really talking about himself, the agent warned petitioner of his constitutional rights to the effect that any statement he made could be used against him. This was proper, especially in light of the fact that any person stating that they were giving bribes could be punished therefor (18 U. S. C. §201). When the agent warned petitioner *after* his initial inquiring statement, the one alleged in the indictment to be the false statement, that whatever statement he made could be used against him, petitioner then decided not to go forward with his proposed complaint. This is all the more evident from the fact that petitioner's

inability or failure to establish his proposed complaint could lead to his prosecution for making a false statement. In the *Friedman* case, *supra,* several long and detailed written statements were furnished by the defendant, acting with his attorney, to the F.B.I. Upon concluding that said complaint was false, Friedman was prosecuted under 18 U. S. C. §1001.

Thus it is clear that petitioner's statement to the F.B.I. agent did not reach the status of a false, fictitious or fraudulent statement or representation "in a matter within the jurisdiction of an agency of the United States". Since petitioner was only attempting to initiate a proceeding or matter with the F.B.I., it was necessary that his statement be complete and full in order to invest that agency with jurisdiction[4] over the matter sought to be presented to it. The degree of completeness required for this purpose would necessarily depend upon the nature and extent of the complaint statement. Here petitioner's statement never proceeded beyond the most preliminary words. The allegations of the indictment were not based upon petitioner's statement, but rather upon subsequent investigation conducted by the F.B.I.

Apart from petitioner's subsequent "admission" that his original "statement" was false, there is absolutely no evidence that it was in fact a false statement. At best petitioner went to the F.B.I. to seek information or to file a complaint. His naivete as to how the F.B.I. operates in these matters was soon shattered by the warning given to him by the Agent Weinberg that whatever he said could

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[4] This assumes *arguendo* that such matters can be within the "jurisdiction" of an investigative agency such as the F.B.I., a legal conclusion with which petitioner disagrees in this petition.

be used against him. Petitioner suddenly realized that by making a complaint of the character involved herein, or even seeking information from the F.B.I., could result in criminal charges against him. At that moment he stopped. He never repeated or even completed his proposed statement.

Furthermore, in attempting to make his statement petitioner was not acting with criminal intent, an essential ingredient required in a violation of the statutes involved herein, *Morissette* v. *United States,* 342 U. S. 246 (1952); *Hughes* v. *United States,* 338 F. 2d 651, 652 (1st Cir., 1964).

3. The proof of the falsity of petitioner's oral complaint, consisting of his later admission to another F.B.I. agent that the original oral complaint was false, was obtained from him in express violation of his constitutional right to counsel, especially after the government had been notified by petitioner's counsel that it did not want him to be interrogated with respect to this matter in the absence of counsel. The record of this case discloses that after petitioner's "attempt" to withdraw his preliminary oral statement, the F.B.I. would not let go. They conducted a full scale investigation into petitioner's background, sent agents to attempt to get petitioner to complete his statement, had him subpoenaed before the grand jury, and then waited for two and a half years, while the case "cooled" off, before sending another agent into his office to question him about the matter. This second agent knew from his file that petitioner was represented by counsel who expressed petitioner's desire not to be interviewed further about this matter, especially in his absence. Nevertheless, in complete disregard and derogation of petitioner's right to coun-

sel, and on the basis of a clear misrepresentation that only a statement in writing or sworn statement could be the basis of charges against petitioner, this second agent proceeded to have an "informal chat" with petitioner, during which he ascertained that petitioner's original "statement" on July 26, 1963 was "false".

This Court has held in recent years that custodial interrogations of defendants without warning of Fifth Amendment rights constitute violation of that amendment and of an accused person's right to the effective assistance of counsel under the Sixth Amendment, *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). This Court has also held that the surreptitious interrogation of an indicted defendant also constitutes a violation of a defendant's right to counsel and privilege against self-incrimination, *Massiah* v. *United States*, 377 U. S. 201 (1964). Several courts have refused to apply these doctrines to non-custodial and non-indicted suspects, although such distinction appears to be without a difference at the heart of these cases. Since the second F.B.I. agent in this case had express knowledge that petitioner was represented by counsel and that he was not to be interviewed in the absence of such counsel, his going to petitioner's office was upon a pretext of checking his records.[5] His actual purpose was to obtain an incriminating statement in the absence of counsel. An examination of the transcript of trial herein clearly reveals that this was the sole purpose of the agent's final interview with petitioner.

[5] There was nothing about petitioner's records which required checking.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG
Attorney for Petitioner

September 20, 1967

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 466—September Term, 1966.

(Argued May 18, 1967 Decided July 27, 1967.)

Docket No. 31048

UNITED STATES OF AMERICA,

Appellee,

—v.—

M. RAYMOND ADLER,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE, *Circuit Judge,* and BONSAL, *District Judge.**

Appeal from a judgment of conviction (18 U. S. C. §1001), entered December 5, 1966, in the United States District Court for the Southern District of New York, after trial before the Honorable Edward C. McLean, sitting without a jury.

Affirmed.

* Of the Southern District of New York, sitting by designation.

DANIEL H. GREENBERG, New York, N. Y., *for Appellant.*

JACK KAPLAN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Douglas S. Liebhafsky, Assistant United States Attorney, on the brief), *for Appellee.*

BONSAL, *District Judge*:

Appellant, M. Raymond Adler, having waived a jury, was convicted in the Southern District of New York on a one-count indictment charging a violation of Title 18, §1001 of the United States Code, which provides:

> §1001. Statements or entries generally
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The indictment charges that "On or about the 26th day of July, 1963, ..." the appellant "in a matter within the jurisdiction of a department and agency of the United States, to wit, the Federal Bureau of Investigation, United States Department of Justice (F. B. I.), unlawfully, wilfully and knowingly did make false, fictitious and fraudulent statements and representations, namely, that while he was

engaged in the performance of a construction contract for the United States, public officials corruptly exacted money and other things of value from him in return for being influenced in their performance of official acts in connection with the said contract, whereas in truth and in fact, as the defendant then and there well knew, no money or other thing of value had been so exacted by any public official."

In July of 1963 the appellant was president of a construction company having as its only Government contract a $3,165,000 contract awarded by the United States Navy in September of 1962 for the construction of houses at the submarine base in Groton and at the underwater sound laboratory in New London, Connecticut.

On July 26, 1963, appellant, on his own initiative, went to the New York office of the F. B. I. where Special Agent Weinberg was assigned to speak to him. Appellant told Agent Weinberg that a "friend" of his had been required to pay bribes to Government officials in the course of completing a construction contract at a Government installation and that he hoped that the F. B. I. "would do nothing more than reprimand the Government officials involved so that this bribery would stop." At this point, Agent Weinberg asked appellant if he was not really talking about himself, and appellant said that he was. Agent Weinberg promptly advised appellant of his constitutional rights, *viz.*, that he need say nothing further, that anything he did say could be used against him, and that he had a right to consult an attorney. Appellant said that he did not wish to make any further statement at the time and that if anyone else asked him about the bribery he would deny it. He indicated that he would be in his New York office the following Monday morning. The following Monday Agent Weinberg went to appellant's office and again advised him of his constitutional rights. Appellant told him at that time that

because the contract was in an early stage it would be unfair to him and his company to say anything further about the bribery, that it could not be proved without his cooperation, and that if any other agents or a grand jury questioned him he would deny it.

The F. B. I. initiated an investigation to determine whether any Government employee engaged in the administration of appellant's Navy contract had in fact solicited or received any bribes. As a part of the investigation, appellant was called before a grand jury, but on the advice of his attorney, refused to answer any questions.

On February 25, 1965, while the investigation was still in progress, Special Agents Stonko and Hendry of the F. B. I. visited appellant's Connecticut office, by appointment, to examine the corporate books and records for evidence of the payment of bribes. Appellant was at the office and the agents identified themselves to him and told him the purpose of their visit. Appellant produced certain corporate records, and before the agents began to examine them, appellant "started talking about his contract with the Navy, his problems that he was having." Agent Stonko interrupted appellant and advised him of his constitutional rights. Appellant went on to say that the bribery accusation he had made in 1963 was false, that he had made the accusation to "get even" with the Government personnel handling his contract because they had been giving him a "rough time," and that he had hoped that an investigation by the F. B. I. might keep the officials "off his back."

At the trial, 80 to 90% of the Government employees involved in the administration of appellant's contract testified that they had never solicited a bribe from appellant, that he had never offered them a bribe, and that appellant had never complained to them that any Government official had solicited a bribe from him. Appellant did not testify.

At the conclusion of the trial, appellant having waived a jury, Judge McLean found the appellant guilty. In a statement for the record, Judge McLean discussed the elements of the crime charged and found that the Government had proven beyond a reasonable doubt: (1) that on July 26, 1963 the appellant made the statement to the F. B. I. charged in the indictment; (2) that the statement was false and that appellant knew it was false; (3) that the statement was made knowingly and wilfully. Judge McLean also found, (4) that since the appellant took the initiative and went to the F. B. I. and made a knowingly false statement to them, the statement was made in a matter within the jurisdiction of the F. B. I. as "jurisdiction" is used in §1001.

We believe that Judge McLean properly defined the elements of the crime. See, *United States* v. *McCue,* 301 F. 2d 452 (2d Cir. 1962), *cert. denied,* 370 U. S. 939 (1962). The evidence with respect to the first three elements viewed in the light most favorable to the Government, *United States* v. *Aadal,* 368 F. 2d 962 (2d Cir. 1966), *cert. denied,* —— U. S. —— (1967); *United States* v. *Castellana,* 349 F. 2d 264 (2d Cir. 1965), *cert. denied,* 383 U. S. 928 (1966); *United States* v. *Brown,* 236 F. 2d 463 (2d Cir. 1956), overwhelmingly supports Judge McLean's findings. We also agree that the statement made by the appellant to the F. B. I. was made in a matter within the jurisdiction of the F. B. I.

Appellant contends (1) that his admission to Agent Stonko of the falsity of his statement to Agent Weinberg was received in violation of his constitutional rights, and (2) that the F. B. I. is not an agency to which §1001 is applicable and, therefore, the giving of false information to the F. B. I. is not "a matter within the jurisdiction of any department or agency" of the Government.

As to the first contention, when Agent Stonko went to appellant's Connecticut office in February, 1965, he was aware that appellant had refused, on the advice of counsel, to testify before a grand jury in December, 1963. However, the purpose of Agent Stonko's visit was to examine the corporate books and records, and when appellant voluntarily began to discuss his problems with the Navy contract, Stonko immediately informed him of his constitutional rights. Appellant was not in custody, there was no criminal charge pending against him, and Stonko's presence in his office was not surreptitious. (Compare *Massiah* v. *United States*, 377 U. S. 201 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).) Appellant's rights were not violated because prior to visiting appellant's Connecticut office Agent Stonko did not seek permission from counsel who had represented appellant on one occasion over a year before. See, *Hoffa* v. *United States*, 385 U. S. 293 (1966); *United States* v. *Fiorillo*, 376 F. 2d 180 (2d Cir. 1967); *United States* v. *Bottone*, 365 F. 2d 389 (2d Cir. 1966), *cert. denied*, 385 U. S. 974 (1966); *United States ex rel. Daskal* v. *Nena*, 361 F. 2d 178 (2d Cir. 1966), *cert. denied*, 385 U. S. 874 (1966).

As to appellant's second contention, appellant relies on *Friedman* v. *United States*, 374 F. 2d 363 (8th Cir. 1967). Friedman had been convicted under §1001 for falsely stating to the F. B. I. (for the purpose of initiating a federal investigation and prosecution of the patrolman under the Civil Rights Laws) that he had been assaulted by a Missouri State Highway Patrolman.* In reversing the con-

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* While the jury found that Friedman's statement to the F. B. I. that he had been "struck, beaten, assaulted, and severely injured and wounded" was knowingly and wilfully false, the majority opinion remarks:

> It is noteworthy, however, that after Friedman had been taken into custody by state officials, Lt. Maxey admitted that he had scuffled with Friedman while he was in custody on two occasions, each last-

viction, the majority concluded that "jurisdiction" of any department or agency as used in §1001 "means the right to say and the power to act," and must be distinguished from "the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action." 374 F. 2d 367. Applying this test, the Eighth Circuit held that a false statement to the F. B. I. to initiate a criminal investigation was not a matter over which the F. B. I. had "jurisdiction" under the statute.

The majority discussed the history of the statute and concluded that Congress was primarily concerned with curtailing "the flow of false information to the newly created regulative agencies" (created under the "New Deal"), and that the courts had been reluctant "to interpret §1001 to cover the investigation of criminal conduct." If "jurisdiction" as used in the statute was not interpreted in this technical sense, the majority was fearful that, "anything more than a casual social conversation with a Government employee would, without warning, subject the speaker to the possibility of severe criminal punishment," which could theoretically exceed the punishment for perjury. These possibilities, to the mind of the majority, might cause citizens to hestitate before giving information to police authorities, thereby frustrating the "important social policy that is served by an open line of communication between the general public and law enforcement agencies."

In the first case to reach the Supreme Court after §1001 was amended into substantially its present form, the court stated that:

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ing about one and one-half minutes, and that Friedman admittedly had some small, observable injuries. Nonetheless, the instant prosecution was instituted in the United States District Court for the Eastern District of Missouri. [374 F. 2d 365.]

> The [1934] amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction. [*United States* v. *Gilliland*, 312 U. S. 86, 93 (1941).]

Similarly, the Supreme Court in *United States* v. *Bramblett*, 348 U. S. 503, 507 (1955), found "no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted," and this court in *United States* v. *McCue, supra*, at 455, rejected "any theory of narrow applicability."

Moreover, the *Friedman* majority's restrictive interpretation of the word "jurisdiction" as used in §1001 cannot be reconciled with the broad interpretation applied to other terms in the statute. The word "statement" has been construed to include statements not required to be made by law, not under oath, and not in writing. *Neely* v. *United States*, 300 F. 2d 67 (9th Cir. 1962), *cert. denied*, 369 U. S. 864 (1962); *Cohen* v. *United States*, 201 F. 2d 386 (9th Cir. 1953), *cert. denied*, 345 U. S. 951 (1953); *Marzani* v. *United States*, 168 F. 2d 133 (D. C. Cir. 1948), *aff'd by an equally divided court*, 335 U. S. 895 (1948). The word "agency" as used in §1001 has been broadly interpreted by the courts to include the Disbursing Office of the House of Representatives, *United States* v. *Bramblett, supra*, and Army Post Exchanges, *Brethauer* v. *United States*, 333 F. 2d 302 (8th Cir. 1964).

In only the so-called "exculpatory no" cases have the courts shown a reluctance to extend §1001 "to cover the investigation of criminal conduct," *Paternostro* v. *United States*, 311 F. 2d 298 (5th Cir. 1962); *United States* v.

Philippe, 173 F. Supp. 582 (S. D. N. Y. 1959); *United States* v. *Davey,* 155 F. Supp. 175 (S. D. N. Y. 1957); *United States* v. *Stark,* 131 F. Supp. 190 (D. Md. 1955); *United States* v. *Levin,* 133 F. Supp. 88 (D. Colo. 1953). As stated in *Stark, supra,* at 207:

> The 5th Amendment provides that no person shall be compelled to be a witness against himself in criminal cases. While not strictly applicable here the construction of section 1001 here sought by the government seems inconsistent with this great bulwark of individual liberty.

However, even this exception to the application of §1001 was rejected by the Ninth Circuit, *Brandow* v. *United States,* 268 F. 2d 559 (9th Cir. 1959), and has not been adopted in this circuit. See, *United States* v. *McCue, supra.* See also, *United States* v. *Van Valkenburg,* 157 F. Supp. 599 (D. Alaska 1958). In any event, the "exculpatory no" cases are readily distinguishable from this case where appellant made an affirmative, voluntary statement deliberately intended to provoke agency action. See, *Paternostro, supra; Philippe, supra; Stark, supra.*

Consistent, therefore, with the view that §1001 was broadly drawn to protect the "authorized functions" of federal agencies from "perversion," the word "jurisdiction" as used in the statute must mean simply the power to act upon information when it is received. The making of intentionally false statements to the F. B. I. calculated to provoke an investigation by that agency may cause more "perversion" of authorized agency functions—and more harm to individuals—than false pecuniary and property claims which are clearly covered by the statute. There is nothing to suggest, either in legislative history or in the

cases, that Congress in enacting §1001 intended to conserve the energies of only certain agencies. Accordingly, a technical construction of the word "jurisdiction" which would exclude from the scope of §1001 all matters strictly criminal in nature, is rejected, and we agree with the views of Judge Register, who dissented in *Friedman*, that individuals, acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F. B. I. Insofar as the penalty for a violation of §1001 may exceed the penalty for perjury, the Supreme Court stated in *Gilliland, supra*, that "the matter of penalties lay within the discretion of Congress." 312 U. S. 95.

We have considered the other contentions of the appellant and find them to be without merit. Accordingly, the judgment of conviction is affirmed.

APPENDIX B

Oral Opinion of District Judge

"The Court: Gentlemen, I have given this matter careful consideration. Each of you has previously submitted a brief to me on the legal question involved, and I have previous to this afternoon read those briefs and the cases in them, and I have made some additional investigation of my own into the law, and just now I took the occasion to reread one or two of the more important cases so that I could be sure that my recollection of them was correct.

Although no statement of reasons is probably required of me at this time, in view of the fact that this is a somewhat novel legal question in this Circuit, I feel that I should say a very few words about it.

The elements of the crime charged in this indictment have been very clearly defined by the Court of Appeals in this Circuit in the McCue case and in the Marchisio case. Those elements are four: One, a statement by the defendant; two, the falsity of that statement; three, that the false statement be made knowingly and wilfully. And, four, that the false statement be made in a matter within the jurisdiction of any department or agency of the United States.

In this case on this evidence I am satisfied beyond a reasonable doubt that the Government has proved that the defendant made a statement, that it was false, and that the defendant knew it was false, and that the statement was made knowingly and wilfully.

That leaves only the fourth element, whether this statement was made in a manner within the jurisdiction of any

department or agency of the United States within the meaning of this statute, 18 U. S. C. Section 1001.

I am fully aware of the fact that there are three District Court cases which Mr. Brill has mentioned, Stark, Levin and Daly cases, in which the Courts have held that under the circumstances of those cases statements made to an FBI agent were not within the meaning of the statute. In each of those cases the statement was made to an FBI agent who came to the defendant and asked him questions in the course of an inquiry.

In none of those cases did the defendant, as this defendant did, take the initiative and seek out the FBI and go to them and make a knowingly false statement to them.

That difference may well justify a difference of result in and of itself, and those cases may be distinguishable because of the different facts and circumstances that I have briefly mentioned.

In any case, apart from that, it was my opinion that the statute was too narrowly construed in those cases. I do not agree with the construction given to the statute by those three Courts. I see no reason why this statute should be limited to statements made to agents which have the power to decide things as well as the power to investigate them.

The reasoning of those three Courts in those three cases was specifically disapproved by the Court of Appeals for the Ninth Circuit in Brandow against the United States, with which you may be familiar, 268 F. 2d 554, Ninth Circuit, 1959. The reasoning of the Brandow case seems to me much more sound than the reasoning of the three District Judges that I have mentioned.

Moreover, although I have found no case squarely in point in this Circuit, the attitude manifested by our Court

of Appeals in the Second Circuit toward the construction to be given to this statute seems to me to indicate a point of view which would reject the extremely narrow construction given it in those three District Court cases that I mentioned.

Accordingly, I hold that this false statement was knowingly made to the FBI in a matter within the jurisdiction of a department or agency of the United States and within the meaning of this statute.

I accordingly find the defendant guilty." (App. App. 178-181)

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280-161—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 649

M. RAYMOND ADLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1967. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certiorari was extended to and including September 25, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a false complaint of bribe solicitations, made to the F.B.I. for the purpose of having an investigation initiated, is a false statement in a matter

within the jurisdiction of a federal agency under 18 U.S.C. 1001.

2. Whether the evidence supports the verdict.

3. Whether evidence was properly admitted of petitioner's unsolicited, volunteered admission to F.B.I. agents while they were examining corporate books in his office after advising him of his rights.

STATUTE INVOLVED

18 U.S.C. 1001 provides, in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner, after waiving trial by jury, was convicted in the United States District Court for the Southern District of New York under an indictment charging that on July 26, 1963, he made a false statement to the F.B.I. to the effect that certain public officials had exacted bribes from him, in violation of 18 U.S.C. 1001 (II R. 1a). On December 5, 1966, he was sentenced to pay a fine of $2,500 (I R. 187). The court of appeals affirmed.

Petitioner was the president of a corporation which in early 1963 was engaged in construction work at a naval facility in Connecticut under a three-million dollar contract with the United States Navy (I R. 19–20, 36).

On July 26, 1963, petitioner, on his own initiative, entered the New York City office of the F.B.I. He told the agent assigned to speak with him that he was there on behalf of a friend who had a construction contract with the government. He said that, in performing the contract, the friend was being required to pay bribes to various government officials (I R. 4–5). Petitioner stated that he "hoped the F.B.I. would do nothing more than reprimand the Government officials involved so that this bribery would stop" (I R. 5). The agent asked petitioner whether he was really talking for a friend or whether he was speaking about his own situation. Petitioner replied that he was speaking of himself (I R. 5, 10). The agent thereupon advised petitioner "that he need make no further statements, that anything he did say could be used against him, and that he was entitled to the services of counsel before continuing" (I R. 5). The agent pointed out that, after an allegation of bribery, the F.B.I. could not merely reprimand those accused, but would investigate the allegation and submit the matter to the proper authorities (I R. 6). Petitioner stated that he did not wish to make any other statements at that time. He said that, if questioned by anyone else regarding the alleged bribery, he would deny the entire matter. He told the agent, however, that he would be in his New York City office the following Monday morning (I R. 6).

On Monday, July 29, 1963, the agent visited petitioner at his office and again advised him of his rights. Petitioner said that he did not wish to discuss the

matter further since he had not yet spoken with his attorney. He felt that, at the early stage of the construction contract, it would be unfair to himself and his company to say anything further about possible bribery (I R. 6–7). He added that the charges could not be proved without his complete cooperation, and that, if questioned by other agents or by a grand jury, he would deny knowledge of any bribery (I R. 7). The agent then left petitioner's office (I R. 7, 12).

As a result of petitioner's charges, the F.B.I. conducted an investigation to determine whether any government employees involved with petitioner's contract had in fact solicited or received bribes (I R. 14, 54–57, 61–62, 67–68, 125–127, 140–141). In November 1963 petitioner received a subpoena to appear before a federal grand jury investigating the matter (I R. 96). Counsel whom he retained informed the office of the United States Attorney that petitioner was being advised to claim his privilege against self-incrimination when he appeared before the grand jury, and that counsel did not wish him to be questioned further by any authorities on the matter (I R. 97–99). On December 5, 1963, petitioner appeared before the grand jury and declined to answer questions, invoking the Fifth Amendment (I R. 99).

Over a year later, in February 1965, an F.B.I. agent engaged in the continuing investigation of the bribery charges telephoned petitioner's office in Stamford, Connecticut, for the purpose of arranging to examine the corporation's books dealing with the Connecticut construction project. The agent was told by

petitioner's secretary that petitioner was recovering from an operation and would be unavailable, but that the books could be examined on February 25, 1965 (I R. 89–92). On that date, the agent who had telephoned, together with another agent, went to petitioner's office to look at the pertinent books (I R. 92–93, 110, 112–113). Upon their arrival they found petitioner at the office. They identified themselves to petitioner, explained that they were investigating the charges that he had been forced to make payoffs, and said that they would like to examine the records pertaining to the contract to see if they contained any verifying information (I R. 92–93, 125–127). Petitioner went into the next room and returned with a few volumes. As the agents sat at a desk to examine them, petitioner began to talk about his contract with the Navy and the problems he was having (I R. 93). The agents interrupted him, and advised him that "he didn't have to talk to [them], he didn't have to make any statement, and that any statement he did make could be used against him in a court of law, and that he could consult with an attorney, his attorney or an attorney of his choice" (I R. 93, 113–114, 119). Petitioner, however, continued to explain his contract problems, stating that the bribery accusations he had made in 1963 were false, that he had made the charges to "get even" with the inspectors and other government personnel involved with the contract who had been "giving him a rough time," and that he had thought that, if the F.B.I. would investigate the charges, it would keep these government officials "off

his back" (I R. 138, 140). After petitioner had talked for three to five minutes, the agents asked if he would make a written statement to this effect. Petitioner replied that he would not do so (I R. 112–114, 117–119).

ARGUMENT

1. Petitioner contends that a false complaint of bribe solicitations, made to the F.B.I. for the purpose of having an investigation initiated, is not a false statement "in any matter within the jurisdiction of any department or agency of the United States" under 18 U.S.C. 1001. He argues that the term "jurisdiction" contemplates a "rule-making or adjudicative power," and that, since the principal power of the F.B.I. is investigative in nature, rather than adjudicative, that agency is not within the coverage of the statute.

The purpose of the statute, however, is "'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93. It would be at odds with the purpose of the statute to interpret the term "jurisdiction" as referring only to "rule-making or adjudicative power" rather than to authority or power in general.[1] See *United States* v. *White*, 69 F. Supp. 562, 564 (S.D. Cal.); *United States* v. *Sanders*, 42 F. Supp. 436, 439 (S.D. Tex.). The phrase in which the term

[1] Indeed, in *United States* v. *Bramblett*, 348 U.S. 503, where the term "department or agency of the United States" as used in 18 U.S.C. 1001 was held to include the Disbursing Office of the House of Representatives, the court stated that it found "no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted" (348 U.S. at 507; see Pet. App. 8a).

appears was not meant to distinguish between different types of agencies or different official functions of a particular agency, but was meant only to differentiate between matters outside of or peripheral to the business of the department or agency involved and matters constituting the official, authorized functions of that body. As noted by this Court in *Gilliland*, it is the perversion and disruption of these "authorized functions" with which the statute is concerned (312 U.S. at 93).

Here, the false charges made by petitioner predictably set into motion the official, authorized investigative function of the F.B.I.,[2] causing the time and energies of several agents[3] to be diverted from other investigations and applied in aid of petitioner's purpose of intimidating and "getting even" with government employees whom petitioner felt had been "giving him a rough time" in evaluating his company's compliance with the specifications of the construction contract. In short, petitioner, for his own purposes, willfully set in motion and perverted the agency's authorized function of investigating alleged criminality of federal officials.

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[2] Petitioner does not question the fact that the F.B.I. is charged with the duty of investigating violations of federal laws in general (see 5 U.S.C. 299, 300; 28 C.F.R. 0.85), and is specifically authorized to investigate allegations of criminality relating to government officers or employees, including allegations of bribe solicitations by government officials which are in violation of 18 U.S.C. 201 (see 68 Stat. 998, now codified in 28 U.S.C. 535).

[3] Petitioner's charges also resulted in the expenditure of time by the federal grand jury which investigated into the matter brought to the F.B.I.'s attention by petitioner (see Pet. App. 4a).

Petitioner points out that in several cases the furnishing of false information to federal investigative agencies has been found not to fall within the prohibition of 18 U.S.C. 1001 (Pet. 10). All of these cases but one, however, involve situations where the defendant simply disclaimed culpability or attempted to divert suspicion by giving false answers to questions by officers involved in an ongoing investigation. In these cases—"the so-called 'exculpatory no' cases" (Pet. App. 8a)—it was found that such a false or negative response to an inquiry could not be considered a statement tending to pervert the authorized function of the agency involved. There is a material difference, however, between giving false answers during an interrogation and willfully initiating a criminal investigation by volunteering false information to trigger the functioning of the agency.[4] *United States* v. *Van Valkenburg*, 157 F. Supp. 599, 601–602 (D. Alaska); see *United States* v. *Stark*, 131 F. Supp. 190, 203–206 (D. Md).

The sole case cited by petitioner which did not involve responses to questioning is *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8). In that case the defendant initiated an F.B.I. investigation of a local police officer who, the defendant claimed, had beaten and severely injured him in violation of his civil rights after taking him into custody. While the divided court of appeals in the *Friedman* case held that this was

[4] As the court below pointed out (Pet. App. 9a), "the 'exculpatory no' cases are readily distinguishable from this case where appellant made an affirmative, voluntary statement deliberately intended to provoke agency action."

not a matter within the jurisdiction of a federal agency, as the terminology is used in the statute, it emphasized that the record in the case showed that the police officer admitted he had "scuffled" with the defendant twice after taking him into custody and that the defendant admittedly did have "some small, observable injuries" (374 F. 2d at 365). It is apparent, therefore, that the court considered the case as one where the defendant had made an exaggerated complaint rather than a totally baseless one. Where, as here, however, a person willfully manufactures and volunteers a totally baseless charge for the purpose of initiating an official federal investigation, he has perverted the functioning of the agency and is properly held liable under 18 U.S.C. 1001. So viewed, the Eighth Circuit's holding in *Friedman,* despite some of the language in the court's opinion in that case, is not necessarily in conflict with the holding of the Second Circuit in the instant case (see Pet. App. 6a–7a).

2. There is no substance to petitioner's argument that the evidence was insufficient to show that he made a false statement or that he harbored any criminal intent (Pet. 11–13). In addition to the evidence set forth in the Statement (*supra,* pp. 3–6), fifteen government employees connected with the administration of the construction contract testified that they had never solicited or been offered a bribe from petitioner and that they had never heard petitioner complain that any other officials were soliciting bribes from him (I R. 18–52, 73–86). The record plainly demonstrates that petitioner's discussion with the F.B.I.

of his charges after an appropriate warning (see Pet. App. 6a). In these circumstances, petitioner's statements were properly admitted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

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